121

(14) (12)

Supreme Court, U.S.
FILED
FEB 25 2009
OFFICE OF THE CLERK

Nos. 07-1428, 08-328

In the

Supreme Court of the United States

FRANK RICCI, ET AL.,

Petitioners,

v.

JOHN DESTEFANO, ET AL.,

Respondents.

FRANK RICCI, ET AL.,

Petitioners,

v.

JOHN DESTEFANO, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF KEDAR BHATIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Alan Sager
7801 N. Lamar St., A114
Austin, TX 78752
(512) 476-3891, ext. 756

Counsel for Amicus Curiae

BOTH 4CVTJR

Questions Presented

(1) When a content-valid civil-service examination and race-neutral selection process yield unintended racially disproportionate results, do a municipality and its officials racially discriminate in violation of the Equal Protection Clause or Title VII when they reject the results and the successful candidates to achieve racial proportionality in candidates selected?

(2) Does an employer violate 42 U.S.C §2000e-2(*l*), which makes it unlawful for employers "to adjust the scores of, or use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race," when it rejects the results of such test because of the race of the successful candidates?

Table of Contents

Table of Authorities iv

Interest of the *Amicus Curiae* 1

Summary of Arguments 2

Argument 3

I. THIS COURT'S JURISPRUDENCE REQUIRES ANY RACIAL CLASSIFICATION TO BE JUSTIFIED UNDER STRICT SCRUTINY 3

A. The city's race-based decision qualifies it for review under strict scrutiny 3

B. The city's rationale for imposing a racial classification does not meet this Court's standard for a compelling interest 7

C. The city's plan is not narrowly tailored to meet its stated interest 12

II. THE DECISION MADE BY THE CITY OF NEW HAVEN MIRRORS QUOTA SYSTEMS THAT HAVE BEEN HELD UNCONSTITUTIONAL BY THIS COURT 16

III. THE REASONABLE APPROACH TO INTERPRETING THE EQUAL PROTECTION CLAUSE SHOWS THAT IT MUST GIVE COLOR-BLIND PROTECTION 18

A. The only sustainable long-term interpretation of the clause is a color-blind one, as evidenced by its development in nations like India 18

B. This is a model case for further sharpening the Court's equal protection jurisprudence 20

Conclusion 22

Table of Authorities

Cases

Adarand Constructors, Inc. v. Pena
515 U.S. 200 (1993) 4, 7

City of Richmond v. J. A. Croson
488 U.S. 469 (1989) 7, 9, 12, 13

Fullilove v. Klutznick
448 U.S. 488 (1980) 9, 12

Gratz v. Bollinger
539 U.S. 244 (2003) 4

Grutter v. Bollinger
539 U.S. 306 (2003) 4, 8, 16, 18, 20, 21

Hazelwood School District v. United States
433 U.S. 299 (1977) 13

Johnson v. California
543 U.S. 499 (2005) 4, 7

Korematsu v. United States
323 U.S. 214 (1944) 4, 9

Lee v. Washington
390 U.S. 333 (1968) 18

Local 28 Sheet Metal Workers v. EEOC
478 U.S. 421 (1986) 10, 13, 14, 15, 16

Loving v. Virgina
388 U.S. 1 (1967) 4, 6

McLaughlin v. Florida
379 U.S. 184 (1964) 9, 21

Missouri ex rel. Gaines v. Canada
305 U.S. 337 (1938) 4, 5, 18

Parents Involved in Community Schools v. Seattle School District No. 1
551 U.S. ___ (2007) 4, 15, 17, 18

Plessy v. Ferguson
163 U.S. 537 (1896) 6

Powers v. Ohio
499 U.S. 400 (1991) 6

Regents of the University of California v. Bakke
438 U.S. 265 (1978) 4

Ricci v. DeStefano
554 F.Supp.2d 142 (2008) 4, 5, 9, 11

Shaw v. Reno
509 U.S. 630 (1993) 5

Sweatt v. Painter
339 U.S. 629 (1950) 18

Teamsters v. United States
431 U.S. 324 (1977) 13

Turner v. Fouche
396 U.S. 346 (1970) 6, 7

United States v. Paradise
480 U.S. 149 (1987) 10, 14

Village of Arlington Heights v. Metropolitan Housing Development Corporation
429 U.S. 252 (1977) 6

Weinberger v. Wisenfeld
420 U.S. 636 (1975) 9

Wygant v. Jackson
476 U.S. 267 (1986) 5, 12

Books

P.P. Vijayan, *Reservation Policy and Judicial Activism*, 2006 ..... 19, 20

S.S. Jaswal, *Reservation Policy and the Law*, 2000 19

Thomas Sowell, *Affirmative Action Around the World*, 2004 19

Interest of Amicus Curiae[1]

Amici is a college student. The role of the Federal judiciary has in shaping every life can hardly be overstated. The views presented in this brief represent the result of hours of debate and dialogue that occurred in the most unusual of circumstances but with the humble goal of shining light on just one portion of the competing interests of precedent, policy, and principle that makes this case both as fascinating and as difficult as any this Court has seen in years.

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Parties have provided written consent, on file with the Court, to the filing of *Amicus* briefs in support of either, or neither party.

Summary of Argument

The most plain reading of the text, history, and purpose of the Equal Protection Clause of the Fourteenth Amendment requires this Court to begin from the proposition that the government may not stratify citizens into classes based on their race.

This Court has held that in rare circumstances government entities may employ racial classifications if they pass a test of strict scrutiny. The District Court erred in not applying strict scrutiny to the decision of the Civil Service Board. This Court has held repeatedly, most recently only two terms ago, that any government decisions involving race should be subject to the most thorough and critical scrutiny available. Because the city openly acknowledged that it based its decision on the race of the individuals who passed the test in question, there can be little doubt that their refusal to certify the results of the test in question was based on, whether justified or not, a racial classification.

Once strict scrutiny is applied, the Court must consider whether a compelling state interest exists. The city first failed to argue a compelling interest with its multi-factor analysis attacking several problems with the test. None of the concerns equate to a valid compelling interest. Attempted compliance with the Equal Protection Clause is not the same as actual compliance and this Court has never held otherwise.

The second part of the strict scrutiny test requires the city to prove that its remedy is narrowly tailored to meet its stated objective. *Ad hoc* rejection of an otherwise valid test does not represent the type

of carefully constructed race-sensitive remedy that this Court has upheld in the past.

Finally, this Court is asked to compare the mechanisms of the city's decision to some of the rigid quota systems that this Court has held unconstitutional in the past. The city considered only the racial distribution of passing firefighters, and after it stated a desire for diversity, it considered only one type of diversity and made that the first criterion necessary to obtain valid test results. Had a higher number of minority students passed the exam, the results would have been certified and applicants of both races would be eligible for promotion. A rigid, number-based system like the one the city implicitly furthered fails the test of strict scrutiny for the same reasons other quota systems have failed.

Argument

I. THIS COURT'S JURISPRUDENCE REQUIRES THAT ANY RACIAL CLASSIFICATION BE JUSTIFIED UNDER STRICT SCRUTINY

A. The city's race-based decision qualifies it for review under strict scrutiny

This Court has consistently and unequivocally held that governmental decisions based on racial and ethnic classifications should be subject to the most rigid scrutiny. Every reason respondents have given for their refusal to certify the test results in question has been based on the race of the individuals who

would have been eligible to receive promotion. Whether the City had hoped to have a more diverse workforce, as role models for younger firefighters, or whether they were concerned about the political consequences of promoting only white firefighters, the City has made a decision premised solely on the race of the individuals in question and must therefore face "the most exacting judicial examination." *Regents of the University of California v. Bakke*, 438 U.S. 265, 291 (1978); *See, e.g., Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Loving v. Virginia*, 388 U.S. 1, 11 (1976); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1993); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger, et al.*, 539 U.S. 306 (2003); *Johnson v. California*, 543 U.S. 499, 505-506 (2005); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. ___ (2007).

Judge Arterton rejected this Court's precedent when she refused to apply strict scrutiny to the case at hand and the Second Circuit affirmed her reasoning and conclusion. Judge Arterton argues that the "result was the same for all because the test results were discarded and nobody was promoted." *Ricci v. DeStefano*, 554 F.Supp.2d 142, at 161. While that very well may be true, the method used in reaching that conclusion was racially-motivated and qualifies for elevated scrutiny. Judge Arterton rejected the presence of a racial classification because the same test was taken by all applicants and no applicants were promoted to the positions they sought. See, *e.g., Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349 (1938) ("The question here is not of a duty of the State to supply legal

training ... but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right").

Judge Arterton's reasoning is not persuasive because state action premised on an unconstitutional racial classification is not defined solely by its impact, but instead by both the method in which it is crafted and the impact it has on individuals. She concedes that administration of the law is as important as its impact and goes on to claim that "the constitutional injury plaintiffs claim here is not failure to be promoted, but failure to be treated equally on the basis of race." Ibid. Judge Arterton acknowledged that for the purposes of petitioner's Title VII claim that "the City's reasons for advocating non-certification were related to the racial distribution of the results," *Ricci, supra,* at 153, but denies the presence of the same "reasons for advocating non-certification" for the purposes of petitioners' equal protection claim. Judge Arterton's Title VII analysis was certainly right to claim that a racial decision had been made as this Court has repeatedly held that state action "against whites and in favor of certain minorities ... constitutes a classification based on race." *Wygant v. Jackson*, 476 U.S. 267, 274 (1986) (plurality opinion of POWELL, J.).

The fact that both races were treated equally by the City still requires the application of strict scrutiny. In *Shaw v. Reno*, 509 U.S. 630 (1993), the North Carolina state legislature drew one predominantly black district and this Court affirmed that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races

equally." *Id.* at 651. *See e.g., Powers v. Ohio,* 499 U.S. 400, 410 (1991):

> The suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which advanced the theorem, *Plessy v. Ferguson,* 163 U.S. 537 (1896). This idea has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree. *Loving v. Virginia,* 388 U.S. 1 (1967).

In *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252 (1977), this Court further affirmed that even facially race-neutral behavior falls under the scope of action that requires strict scrutiny when it is "unexplainable on grounds other than race ... even when the governing legislation appears neutral on its face." *Id.* at 266. In those cases, "[t]he evidentiary inquiry is then relatively easy." *Ibid.* In the case of the New Haven CSB, there can be little doubt that race played a major factor in the decision-making process.

In *Turner v. Fouche,* 396 U.S. 346 (1970), this court was asked to rule on a Georgia statute that specified the method of selection to grand juries and school boards. This Court found that even though the statute was not "not inherently unfair, or necessarily incapable of administration without regard to race," federal courts were not required to sit idly if "they

have been unconstitutionally applied." *Id.* at 355, 356.

This Court has ruled consistently across its equal protection jurisprudence that in fields as varied as redistricting, allocation of zoning permits, and jury selection, government action administered in a way that varies based on race requires the application of the most rigorous scrutiny, regardless of whether or not it is facially neutral.

B. The city's rationale for imposing a racial classification does not meet this Court's standard for a Compelling State Interest

In order for a state-sanctioned racial classification to pass strict scrutiny, it must be "narrowly tailored" to fulfill a "compelling [government] interest." *Johnson, supra,* at 505 (quoting *Adarand*). Of first consideration is the alleged compelling interest because, without it, the tailoring of the proposed remedy is moot.

The Court has frequently upheld two compelling state interests sufficient to warrant the dangerous use of racial classifications. The first is to remedy the effects of past discrimination. However, this widely-used justification does not give governments *carte blanch* to manipulate racial classifications at will. *See City of Richmond v. J. A. Croson*, 488 U.S. 469, 499 (1989) ("[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.").

The second commonly accepted interest justifying racial classifications is the desirability of

diversity in higher education. This Court has affirmed several times that "universities occupy a special niche in our constitutional tradition" because of their "purpose of public education", "the expansive freedoms of speech and thought associated with the university environment," and their ownership of "educational autonomy." *Grutter, supra*, at 329. It follows that arguments that may justify the use of racial classification for institutions of higher education may not be sufficient to justify their use by other parts of the government. The city does not claim to fall under the scope of a center of higher learning.

The City of New Haven failed to support a single "compelling interest" for their use of race-based policy decisions. Testimony from the hearings on certification point to, among other things, (1) the desire to avoid imposing an adverse impact on minority applicants and (2) a good-faith desire to avoid Title VII violation. The city's multi-factor analysis is hardly compelling as both stated interests do not equal the sum of one sufficient interest. The purpose of the 'compelling interest' prong of the strict scrutiny is to ensure that government entities pursue ends that justify the difficult use of race-based decisions in public policy. If the CSB could meet its equal protection requirements by declaring a good-faith attempt at adherence, the Equal Protection Clause would be rendered toothless to stop unlawful and inappropriate discrimination. The government should always be held to a standard that exceeds good-faith attempts at compliance, but even moreso when it involves policy involves opaque government-sanctioned race classifications.

The city argues that because it thought it was adhering to the law, the Court should take it at its word. The District Court picked up on the argument when it noted that "[the city] argue[s] that they had a good faith belief that Title VII mandated non-certification, and they cannot be liable under Title VII for attempting to comply with that very statute." *Ricci, supra,* at 151. Whatever its broader implications may be, this Court has never accepted attempted legislative compliance as a valid "compelling interest" for the purposes of passing strict scrutiny. It is precisely because racial-classifications constitute such a serious use of state authority that this Court must not take the CSB's assurances at face-value without further investigation. *See Weinberger v. Wiesenfeld,* 420 U.S. 636, 648 (1975) ("[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."); *J. A. Croson,* supra, at 501-502; *McLaughlin v. Florida,* 379 U.S. 184, 190-191 (1964) ("Normally, the widest discretion is allowed the legislative judgment ... [b]ut we deal here with a classification based upon the race of the participants"); *Korematsu, supra,* at 235-240 (opinion of MURPHY, J., dissenting).

Many argue that this construction of the equal protection clause invariably tightens a noose around any local governments that employ race-based determinations. The test is fair, but correctly balanced and intentionally difficult. It is by no means "strict in theory, but fatal in fact." *Fullilove v. Klutznick,* 448 U.S. 448, 519 (1980) (opinion of Justice MARSHALL, concurring). This Court has

repeatedly found instances where cities have worked diligently, effectively, and within constitutionally-proscribed limits to craft valid policies that consider race. *See e.g., Local 28 Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986); *United States v. Paradise*, 480 U.S. 149 (1987); Speculative concerns, however, are simply insufficient to justify the presumptively invalid use of race by an entity of the government.

The CSB justifies its decision with a series of secondary rationales that do not pass strict scrutiny individually and do not pass when taken as a whole. The city's desire to avoid certifying a test with an adverse impact on African-American firefighters may have constituted a legitimate concern, but only if they had taken steps to verify that the test might actually present an unlawful adverse impact. The city refused to conduct a validation study in order to fully consider the issue and without one, they have no reason to reject the test on the grounds of its adverse impact.

The city contacted several experts to analyze the tests but the experts could only postulate inconclusively about the cause, reasoning, and legal implications of the test in question.

Some firefighters argued that the test questions covered knowledge required in their desired positions (including defendant Frank Ricci himself) while others suggested that the test asked questions unrelated to anything they would encounter in the real world. One of the experts contacted by the CSB, Fire Program Specialist Vincent Lewis, believed the tests were appropriately based on necessary knowledge after looking at the tests. Upon the question of job-relatedness, the city

chose not to conduct a thorough validation-study to compare the test to the EEOC's "Uniform Guidelines of Employee Selection Procedure." *Ricci*, *supra*, at 146.

Opinion was also split on the question of why so many more non-minority applicants passed than minority applicants. The CSB first heard from Dr. Christopher Hornick who, after conceding that he had not "had time to study the test at length or in detail," told the board, "I'm not sure I can explain it." Regardless, he went on to hypothesize that the weight assigned to the various parts of the test may have been the cause of the disparity.

The final expert to appear before the CSB, Dr. Janet Helms, spoke about the general correlation between race and test performance but had not examined the specific tests in question. *Id.* at 150. Dr. Helms spoke of the different impact that certain testing methods generally have on minority and non-minority applicants including, but not limited to, "speak accented speech," different job-related strategies, and differing levels of on-the-job mentoring. *Ibid.*

Upon seeing the results of the test, the CSB did what it could only be expected to do: it held hearings to investigate the implications of the test results. Based on the record, the findings of its hearings were murky and inconclusive, certainly not the kind of results that would require, or even merit, the use of a race-sensitive remedy.

The CSB contend that the promotions recommended by examination would "undermine their goal of diversity ... and would fail to develop managerial role models for aspiring firefighters." *Id.*

at 163. As mentioned above, the goal of achieving racial diversity itself is not justification sufficient to create racial-classifications without regards to other types of diversity.[2]

The desire to create role models for minorities was explicitly discredited by this Court as a valid compelling interest in *Wygant* and now represents exactly the type of "generalized assertion" that provides insufficient guidance "for a legislative body to determine the precise scope of injury it seeks to remedy" and "has no logical stopping point." *Id. at J. A. Croson*, 498 (internal quotations omitted). quoting *Wygant, supra*, at 275-276.

The Court has rejected all of the CSB's claims in past cases. The fact that they offer several different rationales for their decision does not lend credence to their argument as a whole.

C. The city's plan is not narrowly tailored to meet its stated interest

The two prongs of strict scrutiny are closely related and, as such, policies must feature "the most exact connection between justification and classification." *Fullilove, supra*, at 537.

The City of New Haven considered only the numerical distribution of the test before concluding that it was an inappropriate examination. Its reliance on sheer numbers represents an unlawfully

---

[2] *See Grutter, supra*, 316 ("The policy does not restrict the types of diversity contributions eligible for substantial weight in the admissions process, but instead recognizes many possible bases for diversity admissions.) (internal quotations omitted).

broad method for achieving racial balance. *Id. at J. A. Croson*, 507 (opinion for the majority) ("[T]he 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing").

This Court has previously upheld narrowly drawn number-based racial stratifications as an appropriate remedy for past discrimination. Most notably, in *Sheet Metal Workers, supra*, this Court concluded that, after nearly a decade of extensive mediation between unions, the EEOC and local government, a District Court was justified in imposing a membership goal of 29.23 percent. In fact, six members of that Court felt that the District Court had properly applied a nonwhite membership goal based on extensive research and consideration of employment factors such as the racial composition of the relevant labor market. *Id.* at 478 U.S. 482.

In *J. A. Croson*, this Court refused to accept that discrimination could be proven by looking at numbers alone. The Court held that "for certain entry level positions ... statistical comparisons of the racial composition of an employer's workforce to the racial composition of the relevant population may be probative of a pattern of discrimination." However, "where special qualifications are necessary," only the comparisons to the relevant qualified applicant pool can serve to prove patterns of discrimination. *J. A. Croson, supra*, at 501. *See also Teamsters v. United States*, 431 U.S. 324 (1977); *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

Determining the relevantly qualified applicant pool is a difficult task, as the Court found in *J. A. Croson*. If the promotion rates suggested by the test taken by respondents accurately represents the

proportion of qualified applicants in the pool, the city would have difficulty proving that rejecting the test at hand would be the most narrowly tailored method of increasing the number of qualified applicants.

The CSB's rejection of test results does not "narrowly tailor" a remedy to fix the low minority promotion rate that the test allegedly creates. The CSB does nothing to increase the number of minority firefighters and instead, blocks all firefighters who took this particular test. This defense contradicts the argument made by the city that its decision was made to rectify past episodes of discrimination.

The decision of the District Court in *Sheet Metal Workers* came after extensive research and planning in order to provide a narrow but effective remedy to past malicious discrimination and repeated "bad-faith attempts to prevent or delay affirmative action." 478 U.S., at 431. It was clear to the Court that the behavior of the employers at hand warranted the use of a race-based employment goal and that nothing short would satisfy the government's interest in reversing past discrimination by the union in question. In the case of the Local 28 Union, episodes of egregious past discrimination were being neutralized by a well-researched and purposefully designed recruitment scheme. *See e.g., Paradise, supra*, at 185 ("The one-for-one requirement is the product of the considered judgment of the District Court which, with its knowledge of the parties and their resources, properly determined that strong measures were required in light of the Department's long and shameful record of delay and resistance.") (Opinion of BRENNAN, J.).

Unlike the District Court in *Sheet Workers*, the Civil Service Board took none of the same exhaustive steps to carefully tailor and administer its 'remedy'. The CSB opted out of conducting a validation study to determine the job-relatedness of the test itself. If the test had been found to be job-related, the use of race may not have been a factor and the city may have been able to certify the tests. Instead, it took the conflicting testimony of experts to mean that they had reason to believe that the test might have problems and they they would probably be justified in refusing to certify the test.

The CSB's *ad hoc* decision simply does not translate to a valid method of attaining *any* valid compelling interest in racial disparity. In *Parents Involved*, Justice Kennedy noted that apparent inconsistencies in the applications of the Jefferson County's guidelines resulted in a "far-reaching, inconsistent, and *ad hoc*" approach to creating diversity. *Parents Involved, supra,* slip. op. at 5 (opinion of KENNEDY, J., concurring in part and concurring in the judgment). The decision of the CSB to reject the results of the examination in question is justified by an even more opaque rationale revolving around arguable conclusions based on uncertain assumptions about the past history of discrimination and the impact of the test on current applicants.

Strict scrutiny asks difficult questions of the CSB and for good reason. Racial-classifications must be used only as a method of last resort and only in the most narrow circumstances. Here, the CSB made the decision to use racial-classifications after conflicting evidence and testimony suggested that it might be within the law to do so. In all of the cases

where race-based classifications were deemed to be a valid interest, cities and local governments were in involved comprehensive and patient analysis of past-discriminatory practices. The CSB did no such in-depth review and has not shown that it considered all of its options before reaching the conclusion that it could strike down the results of the examination.

II. THE DECISION MADE BY THE CITY OF NEW HAVEN MIRRORS QUOTA SYSTEMS THAT HAVE BEEN HELD UNCONSTITUTIONAL BY THIS COURT

This Court's precedent has long held that race-based quota systems, and even quota-like systems, are unconstitutional applications of racial classes. Most recently, in *Grutter*, the majority defined a quota as, among other things, having "a fixed number or percentage which must be attained, or which cannot be exceeded" *Grutter, supra*, at 335, quoting *Sheet Metal Workers, supra*, at 495 (opinion of O'CONNOR, J., concurring in part and dissenting in part). In New Haven, if a certain number of minority firefighters had passed, the city would have certified the results of the test and, if not, the city would refuse to certify the test.

The system at play in New Haven does not consider "race as one factor among many." *Grutter, supra*, at 340. The City of New Haven saw the results of the test and determined that the results could not be certified solely on the basis of the race of the applicants who would have been eligible for promotion. In comparison to the use of affirmative action in higher education, the city's use of arbitrary

racial quotas represents a bizarre twist on the use of race-based hiring practices. In higher education affirmative action practices, individuals are competing for admittance to universities based on several factors at their control, including grade point average, standardized test scores, and extracurricular activities, of which race is often considered a tie-breaker between similarly qualified students.

Petitioners, however, had only one criteria to meet before becoming qualified for promotion - the results of a test measuring their knowledge and familiarity with the aspects of the job they hoped to perform. They passed this test yet the results were rejected across the board because an insufficient number of minority applicants had the skills or knowledge required to pass what has been universally acknowledged to be an appropriate measurement of the necessary requirements for promotion. The city did not pursue a legitimate affirmative action procedure - considering race along with performance on this exam - they simply rejected the exam based on a statistical review of the results of the otherwise legitimate exam.

In this Court's most recent precedent on the matter, *Parents Involved v. Seattle School District No. 1*, the Court held that simply looking at the number of students who fall into a particular racial category cannot justify the use of racial classifications. The opinion in *Parents Involved* quoted from the *Grutter* decision at length and sought to reaffirm the "entire gist of the analysis in *Grutter* was that [the university] focused on each applicant as an individual, and not simply as a

member of a particular racial group." *Parents Involved, supra,* slip op. at 14.

III. THE REASONABLE APPROACH TO INTERPRETING THE EQUAL PROTECTION CLAUSE SHOWS THAT IT MUST GIVE COLOR-BLIND PROTECTION

The most plain reading of the text and purpose of the Equal Protection Clause of the Fourteenth Amendment requires this Court to begin from the proposition that the government may not stratify citizens into classes based on their race.

A. The only sustainable long-term interpretation of the clause is a color-blind one, as evidenced by its development in nations like India

This court has wrestled for decades to patrol the zone between permissible policy decisions centered on race and impermissible decisions denying certain classes of citizens the equal protection of the law. *See, e.g., Missouri ex rel. Gains v. Canada, supra*; *Sweatt v. Painter,* 339 U.S. 629 (1950); *Lee v. Washington,* 390 U.S. 333, 334 (1968). Throughout the world, Courts have faced similar problems and interpreted similar statutes in a variety of ways that shed light on the future of America's own approach.

For example, India has struggled with state-sanctioned "positive discrimination" since the founding of its Constitution in 1947. Thomas Sowell, *Affirmative Action Around the World,* 2004. Those protections, designed to be temporary and

conciliatory in nature, have been extended well-beyond their originally proposed time frame and have fueled the type of racial animosity they were designed to extinguish. Id. at 21.[3]

The Indian model of equal protection draws heavily from the American model that had already been used extensively when it was incorporated into Article XIV of the Indian Constitution.[4] After decades tailoring and adjusting the limits of equal protection jurisdiction, in 1993 the Supreme Court of India mandated the creation of a "creamy layer" exception to the positive discrimination granted to Other Backwards Classes, the most poor and disadvantaged classes in the country. That Court held that states should design procedures to remove from racial benefits the "creamy layer" of individuals who are advanced enough to no longer warrant the benefit of discrimination in their favor. Politicians around the country stalled, and the Court was forced to deal extensively with the lack of political will to curtail the use of caste-based discrimination. P.P. Vijayan, *Reservation Policy and Judicial Activism,* 2006, at 78.

Commissions later strove to curtail the use of racial preferences in public policy and produced mixed results. What is clear, however, is that the policies that were originally intended to be temporary quickly evolved into broad, seemingly

---

[3] For information on the initial timeline proposed, see S.S. Jaswal, *Reservation Policy and the Law* (2000), at 63.

[4] Article XIV of the Indian Constitution reads: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

permanent policies. These policies then could never be explicitly phased out or narrowed to meet the required constitutional limitations. *Id.* at 81-84.

In furtherance of a similar goal, this Court has maintained that racial classifications designed to help one race at the expense of other races "must have a logical end point." *Grutter*, *supra*, at 342. This Court should define the end point.

If we are to learn from the experiences of other nations, it would be evident that state-sanctioned racial stratifications will not simply evaporate on their own accord. Our nation has undoubtably made substantive strides toward fixing the racial conflict that sparked a civil war and fueled another century of tension and conflict. The historic election of our nation's first black President shows how far we have come in the struggle to eliminate *de jure* discrimination and to recitify *de facto* barriers to equal protection. Justice O'Connor's prediction that racial classifications would no longer be a valid compelling interest 25-years after *Grutter* will likely ring true. If anything, recent events suggest that our nation has moved towards that point much faster than anyone could have predicted even 5 years ago.

B. This is a model case for further sharpening the Court's Equal Protection jurisprudence

It is difficult to see any firefighters benefiting from the decision of the CSB. No more minority firefighters have been promoted than would have otherwise been promoted if the test results had been certified. Non-minority firefighters who legitimately studied for and passed their exam have been denied

the chance to be considered for promotion and the pay increases that would accompany that promotion. The decision of the CSB was so broad as to unduly injure innocent parties but also provided no direct, or even indirect, benefit to the parties it alleges to aid. *See, e.g., McLaughlin, supra,* at 190 ("The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose").

The idea that policies should evolve with the changing standards of society is nothing new to this Court. *Grutter, supra,* at 342. ("[R]ace-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands.") Reaffirming the principle that racial classifications are valid only as long as their "interest demands" would not require this Court to expand or narrow its precedent. It would only require this Court to enforce the well-accepted and reasoned principle that racial classifications are useful, but ultimately temporary measures.

Concluding that racial classifications are less necessary than before does not rely upon first accepting the premise that we live in a post-racial world. Whatever the merits of that argument, this Court is only asked about limits of government action. The government alone cannot completely solve the problem of racial conflict in this country, nor does the Constitution allow it.

The questions presented in this case cut straight to the heart of equal protection guarantees around

the country. The Civil Service Board made an *ad hoc* promotion decision that disadvantaged a group of firefighters because too many of them were of the same race. This Court has the opportunity now to provide guidance to local and state government officials about the proper application of racial classifications when making promotion decisions. A role for narrow racial classifications may exist within the scope of the equal protection clause, and this case marks an important opportunity for this Court to clarify its precedents.

Conclusion

The CSB's overwhelming rationale for rejecting the test was the sheer number of non-minority firefighters who would have been eligible for promotion if the results of the test were certified. Other reasons not to certify - the scope of the test, its administration, or the way in which it was weighted - do not provide a valid compelling interest for the city to act on. Several potentially valid interests cannot be summed to equal even a single valid compelling interest for the city's use of race in making an *ad hoc* promotion decision.

The government's use of race in decision-making should always be a method of last resort and made only in the most pressing circumstances. The facts of the case as presented in the record suggest that the Civil Service Board did not exhaust all of their investigative tools when deciding to make an extreme decision to block several firefighters from promotion opportunities because too many of them had a certain skin color.

Affirmative action programs have always been designed for only temporary use in solving the most egregious, immediate disadvantages that minorities face. These programs must be both specific and narrow, and are properly reserved for only the most compelling government interests. It is difficult to see any firefighters benefiting from the decision of the CSB. No more minority firefighters have been promoted than would have otherwise been eligible for promotion if the test had been certified. Reaffirming the principle that racial classifications are valid only as long as long as the state's interest is compelling would not require this Court to expand or narrow its precedent. It would only require this Court to apply the standards it has applied in the past while acknowledging, as it always has, the protections guaranteed by the Equal Protection clause.

Respectfully submitted,

Alan Sager
7801 N. Lamar St., A114
Austin, TX 78752
(512) 476-3891, ext. 756

Counsel for Amicus Curiae